Supreme Court, U.S.
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No. 98-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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This petition presents fundamental issues regarding 18 U.S.C. § 1346, Congress' response to this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). The issues are (1) whether the "intangible right of honest services" statute applies to the private sector, an extension that involves a radical expansion of federal power into areas of historic state concern and permits a federal prosecutorial club over the performance of every contract in the nation; and (2) whether a state law (or independent federal law) violation is required to give a defined, ascertainable meaning to the criminal proscription against the deprivation of an "intangible" legal "*right*."

This Court has not considered the validity, meaning, or scope of this cryptic, 27-word criminal law in the decade since *McNally* was decided and Congress responded. Both issues have "percolated" in the courts of appeals for years; indeed, courts of appeals have expressed grave concern about the first, and are squarely split on the second. On their face, both issues are important and recurring. The questions presented are ripe for this Court's review.

Because the prohibition is a criminal statute, doubt about its scope threatens personal liberty in the most direct sense. As the National Association of Criminal Defense Lawyers emphasized in its amicus brief supporting the petition, federal prosecutors are exploiting the uncertainty surrounding the "intangible right of honest services" statute to bring ever-more adventurous prosecutions, to provide a "catch-all" back-up theory, and to exact otherwise unavailable concessions and advantage.

This case, moreover, presents an especially compelling illustration of the problems with this amorphous crime. Petitioner stands convicted of violating the "intangible right of honest services" statute in his private contractual

relationships even though (1) the "intangible right of honest services" that he allegedly violated is nowhere defined in federal law; (2) the "intangible right" at issue likewise does not rest on any "right" defined by state law; and (3) the private contracting parties allegedly "deprive[d]" of their "intangible right" under the contract emphatically testified that they were not victims and that petitioner had rendered exemplary services in all respects. Where, then, is the clear boundary that permits the imposition of criminal sanctions?

The "intangible right of honest services," as asserted by the government in this case and prosecutors throughout the nation, is so low a threshold that it need only be defined in the mind of the federal prosecutor, with no reference to a "right" grounded in existing law — or even to the views of the private contracting parties whose "intangible right to honest services" purportedly is at issue. The confusion concerning this statute is so rampant, moreover, that, incredibly, in this case, the government was permitted to introduce evidence allegedly showing petitioner's "subjective" understanding of state law, while petitioner was denied an opportunity to present evidence concerning the actual "objective" meaning of state law and his compliance with it. Even the district court found the alleged fraud here to be "de minimis," "thin," and "obscure." Pet. 5, 11.

Having first attempted to evade review of these fundamental issues by waiving a response, the government now has confirmed that it has little to say on the merits as to why these fundamental and recurring issues should not now be reviewed by this Court. Instead, the government seeks to evade review by raising a smokescreen of supposed procedural objections. The government's objections are entirely spurious. Procedural nuances, of course, are relevant considerations; it never has been the case, however,

and must not be the case, that the government's mere invocation of supposed procedural obstacles, no matter how erroneous, creates a fog that defeats review in this Court. Upon scrutiny, the government's objections collapse, and do not detract from the pressing need for review.

Accordingly, in this reply, we will first address, and correct, the government's misconceptions regarding procedural obstacles. Once these spurious objections are put to one side, it is clear that twelve years after this Court's *McNally* decision, and eleven years after Congress sought to "reverse" *McNally*, it is of paramount importance that this Court consider fundamental issues regarding the scope and content of this federal criminal prohibition.

I. THE GOVERNMENT'S ATTEMPTS TO INVOKE SUPPOSED PROCEDURAL OBSTACLES ARE A RED HERRING.

The government's suggestions of procedural obstacles are fallacious. The government raises three principal objections: that petitioner's convictions may be permitted to rest on an alternative basis; that this Court previously has denied certiorari regarding the extension of Section 1346 to the private sector; and that the role of state law should not be addressed. All three are unfounded.

First, having brought an "intangible right of honest services" prosecution and argued to the jury that it was an independent basis for conviction, the government now frantically argues that this Court should disregard it. Opp. 7. The government acknowledges that (1) the indictment alleged criminal liability based on two separate legal theories — obtaining "money and property" (18 U.S.C. § 1341) and depriving "another" of the "intangible right of honest services" (18 U.S.C. § 1346); and (2) settled law requires

reversal of a criminal conviction where a case is submitted to the jury on alternative legal theories and one legal theory is invalid. Opp. 7; Pet. 23 n.19. Therefore, if the Section 1346 theory is legally invalid, then petitioner is entitled to relief.

Remarkably, however, the government now contends that the issues concerning Section 1346 need not be reviewed because the jury verdict "necessarily included" a money-or-property finding. Opp. 7-8. This contention is a desperate attempt to avoid review at all costs; it relies on conjecture and misstatement rather than analysis and fidelity to the record. The district court charged these two theories in the disjunctive.[1] The government, moreover, relied on "honest services" theories that did not depend on money-or-property. For example, the government variously argued to the jury that an "honest services" violation resulted because petitioner allegedly put his clients at risk of legal jeopardy,[2] and because petitioner concealed from his clients the *identity* of supported candidates.[3] Having thus relied on Section 1346 to impose "honest services" liability without relying on money-or-property, the government cannot now run from the consequences and attempt to avoid review by claiming that it did not mean what it (and the court) said.

Second, with regard to the government's expansion of the "intangible rights" crime to the private sector, the

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[1] *See, e.g.*, Tr. 1698 (THE COURT: "The Government must prove the defendant contemplated depriving another of the intangible right of honest service *or* harm to the property of another.") (emphasis added).

[2] *See, e.g.*, Tr. 1622 (THE GOVERNMENT: "Mr. Bereano put [his client] in violation of that law. Is that honest and faithful services?").

[3] *See, e.g.*, Tr. 1623 (THE GOVERNMENT: "Mr. Bereano was making a secret contribution [to a candidate not supported by his client]. Is that honest and faithful services?").

government suggests that this Court's previous denial of four petitions from one court of appeals decision somehow counsels against review here. Opp. 8. Most fundamentally, of course, a prior denial provides no independent basis to refuse review. *See, e.g., Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 & n.4 (1998) (grant of certiorari after repeated denials). In this case, moreover, the government's suggestion is especially weak: the government points to four *pro se* petitions from co-defendants that presented very different arguments from petitioner's, and did not arise in the contract-for-services context that is at issue here. Once again, the government's assertion is insubstantial, and provides no sound basis for this Court to deny review.

Third, with regard to the role of state law, the government contends that the issue has not been adequately preserved. Again, the government's contention is erroneous; disturbingly, moreover, in its apparent zeal to avoid review, the government has made an important, selective omission in its submission to this Court.

The government initially claims that the issue was not raised in the district court. The government's presentation, however, is erroneous, and troublingly incomplete. The government quotes from the district court's initial pre-trial decision. Opp. 13. Significantly, the government fails to mention that petitioner subsequently filed a motion to reconsider, relying on new authority, *in which petitioner explicitly argued that the indictment should be dismissed precisely because it did not rest on a state law violation*. CA JA 414. The government's selective omission is especially disturbing because the petition cited and quoted this motion. *See* Pet. 8 (quoting petitioner's motion arguing that a state law violation was a "*necessity*") (emphasis added).

Proceeding from this mischaracterization, the government also contends that the court of appeals context counsels against review. The government cannot deny, however, that (1) the court of appeals explicitly addressed the requirement of a state law violation (Pet. App. 19a); (2) controlling circuit precedent already had considered, and rejected, the requirement of a state law violation (*id.*) — *a point that the government repeatedly emphasized in its appellate brief* (Gov. CA Br. 7, 15-16); and (3) the role of state law was central to petitioner's appeal (in which, among other points, he vigorously objected to his inability to present evidence of the actual meaning of, and his compliance with, state law).

Undaunted, however, the government asserts that petitioner did not properly "dot the i's and cross the t's," and this Court should not address this fundamental issue. Even if no other circumstance were present, the court of appeals' "passing" on the issue plainly renders it ripe for this Court's review. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for [this Court's] purposes that the court below passed on the issue presented," particularly when, as here, "the issue is . . . in a state of evolving definition and uncertainty . . . and [is] one of importance to the administration of federal law.").[4]

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[4] Rather than the casual "introduct[ory]" comment suggested by the government, the court of appeals' conclusion concerning state law was an important predicate, both to petitioner's objections concerning the government's use of "subjective" evidence of his alleged understanding of state law (which the court of appeals addressed) and to petitioner's objection that he was prohibited from introducing evidence of the actual meaning of, and his compliance with, state law (which the court of appeals failed to address). Furthermore, contrary to the government's claim, petitioner squarely raised the required relevance of state law. *E.g.*, Pet. CA Br. 23 ("The overriding non-ending error in this case below occurred because the prosecution bamboozled the trial judge into believing that Maryland election laws were 'irrelevant to [this] mail fraud prosecution.'").

Far from not being preserved, moreover, the proper role of state law was central to this case. Indeed, this case vividly illustrates the bizarre and distorted consequences produced by the confusion in current law: no state law violation was required; the government introduced evidence of the defendant's purported "subjective" understanding of state law; the defendant was barred from producing evidence of the actual meaning of, and his compliance with, state law.

The government again offers a baseless procedural objection in a transparent attempt to avoid review of these critical issues. The government's efforts to shield this statute from scrutiny should not be allowed to defeat review.

II. THE ISSUES PRESENTED WARRANT REVIEW.

Purged of its spurious procedural objections, the government's opposition has nothing of consequence to say as to why the issues presented do not warrant review.

1. The government's opposition is most notable for what it does *not* do: attempt to provide any coherent interpretation of the statutory language forming the basis for criminal liability. In *McNally*, this Court was emphatic in emphasizing the dangers of a free-floating "honest services" form of federal criminal liability and requiring Congress to legislate "clear[ly] and definite[ly]" before imposing such liability. 483 U.S. at 361. In response, Congress adopted the most *unclear* statement imaginable — a terse statute criminalizing the "depriv[ation]" of the "intangible right of honest services" of "another," with not a single word explicating or defining the statute's essential elements. This 27-word statute is riddled with ambiguity on every material term. Pet. 14-23. The government is simply mute about the language; its advocacy-by-avoidance strategy, however, does not minimize the glaring ambiguities permeating the statute.

Indeed, rather than attempt to provide any meaning to the statutory language, the government instead seeks to rely on legislative history to provide the requisite clarity that is missing from the statutory text. Opp. 10. Even leaving aside the obvious problems with the government's reliance on legislative history for this purpose (Pet. 20), the government's submission again is disturbingly incomplete and selective. For example, in quoting Representative Conyers, the government fails even to mention that Rep. Conyers enumerated specific types of cases to which the statute would apply — *none of which includes petitioner's private contractual relationships*. Pet. 20 n.16. Thus, the legislative history, to the extent it is relied upon at all, directly refutes the government's expansive interpretation.[5]

Similarly, rather than explicating the statutory language, the government argues that Section 1346 merely "restores" pre-*McNally* case law. Opp. 10. In addition to the other problems with this theory (Pet. 18), the government cannot overcome the fact that pre-*McNally* case law included inconsistent decisions, *including a decision holding that the "intangible right to honest services" theory does not extend to the private sector*. Pet. 19 n.13. The government attempts to avoid the implications of this holding by claiming that it was undermined by post-§ 1346 decisions (Opp. 9 n.5); post-enactment decisions, however, obviously do not detract from the significance of the fact that the case law *before* Section 1346 was enacted — on which the government professes to place such reliance — was

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[5] With regard to the lack of clarity, moreover, to the extent that Section 1346 can be interpreted as "either a meat axe or a scalpel," it "should reasonably be taken to be the latter." *United States v. Sun-Diamond Growers*, No. 98-131, 1999 WL 241704, *9 (U.S. Apr. 27, 1999); *see also* Pet. 21-22.

conflicting, thereby illustrating the inherent flaw in the government's "restor[ation]" theory.[6]

2. With regard to the expansion of Section 1346 beyond public officials to the private sector, the issue warrants this Court's review. The repeated expressions of concern by courts of appeals are well-founded: the government's position represents a stunning expansion of limitless prosecutorial discretion into areas historically regulated by the states (or by civil actions between contracting parties). Pet. 14-23. At the very least, such an expansion — with its profound consequences for liberty and on so thin a basis — should be considered by this Court.[7]

3. With regard to the requirement of a state law (or federal law) defining the "intangible right of honest services," there is a square Circuit split. *Compare, e.g.*, Pet. App. 19a *with United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 625 (1998). The government's weak response again confirms its desperation to avoid review. The government asserts that *Brumley* involved a public official, not a private individual. Opp. 14-15. The *en banc* decision requiring a state law violation, however, uses specific language that leaves no doubt about the requirements of Section 1346 in the Fifth Circuit. 116 F.3d at 733-34 (question is "the meaning of honest services as used in this federal statute"; "[w]e decide

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[6] Pre-*McNally* case law likewise includes authority requiring a state law violation. Pet 25 n.20. The government simply fails to address this authority.

[7] Contrary to the government's suggestion, a split in the Circuits obviously is not, and never has been, the sole criterion for certiorari jurisdiction. *Eastern Enterprises*, 118 S. Ct. at 2144 n.4. Particularly where, as here, the issue has far-reaching significance, involves personal liberty, and has been the repeated subject of expressed concern by courts of appeals, review is warranted.

today that services must be owed under state law").[8] Petitioner could not have been prosecuted in the Fifth Circuit under Section 1346 without a state law violation; that he nevertheless was convicted in the Fourth Circuit without such a violation — with no resolution of which Circuit correctly interpreted this federal criminal statute — is intolerable, and fundamentally inconsistent with basic principles of fairness and equal justice.

4. This petition also presents still another issue warranting review: whether contemplation of harm is a necessary component of mail fraud and an issue for which victim testimony is relevant. Pet. 28-30. The government makes much of the court of appeals' effort to sidestep this clear circuit split, but ignores the fact that the court's rationale for doing so — that victim testimony is "irrelevant" to the question (Pet. App. 10a) — is patently erroneous, and itself generates another circuit split. Pet. 29 n.24. Again, the government's advocacy-by-avoidance should not prevent review by this Court of these fundamental mail fraud issues.

The issues presented are important and recurring. They relate to the proper administration of an oft-utilized federal criminal statute; the court of appeals' resolution of each issue was erroneous; and petitioner has been wrongly deprived of his liberty. The issues warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Tellingly, in its eagerness to avoid review, the government argues *for* a public/private distinction on the need for a state law violation, and *against* such a distinction on the statute's inapplicability to the private sector. Opp. 8-9, 15.

Respectfully submitted,

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